IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH.

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FAO NO. 2038 OF 2006
DATE OF DECISION: AUGUST 30, 2007.

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Nirmal Devi wife of Raghbir Singh daughter of Kartar Singh, resident of Village Barwal, District Kathua (J&K).

Versus

Raghbir Singh son of Bishamber Singh, resident of Village and Post Office Jharoli, Tehsil and District Gurdaspur, now posted at 7 Mech. Inf. C/o 56 A.P.O.

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Before: Hon'ble Mr. Justice R.S.Madan.

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Present: Shri M.S.Bedi, Advocate, for the appellant.

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R.S.Madan, J (Oral)

The controversy raised in this revision petition is “Whether the substituted service effected upon the respondent by way of proclamation is due service in the eyes of law or not” ? The answer to the aforesaid controversy can be judged from the facts of the present appeal.

Raghbir Singh, respondent had filed a petition under Section 13 of the Hindu Marriage Act for dissolution of marriage by way of decree of divorce, against the present appellant Nirmal Devi, on the ground of cruelty. It is the case of the respondent that after the solemnization of the marriage on 30.04.1993 at Village Bagey Chack, Tehsil & District Kathua according to Hindu Rites and out of this wedlock a child, namely, Manju was born, who is at present residing with the respondent. It is alleged that this was the second marriage of the petitioner with the respondent as his first wife had died on account of illness. A female child was also born out of

the first marriage of the respondent, who is also residing with the respondent. It is also the case of the respondent that from the very beginning of the marriage, the behavior of the respondent with the petitioner and his family members was not good and she maltreated them by saying that the marriage was solemnized against her wishes and she did not want to live with the petitioner. She always quarreled with the petitioner and his family members and left the matrimonial home without any reason. The petitioner visited many a times at the parental house of the respondent to bring her back but she always refused to accompany the petitioner on the pretext that she has to marry some other person after getting divorce from the petitioner. It was on this back-ground that she is treating the petitioner with mental cruelty by trying to commit suicide once by touching the live electric wire and on the other occasion by jumping into the Canal near the Village. It is alleged that in the month of August, 1997 on the pretext of Raksha Bandhan, the respondent after staying with him for 2/3 months, left the house of the petitioner for her parental house and thereafter did not return to the matrimonial fold. The petitioner in order to bring her back also convened Panchayats to resolve the dispute but it was of no result. Hence, the present petition was filed by the respondent for dissolution of marriage under Section 13 of the Hindu Marriage Act.

After the filing of the petition, the respondent was served through publication. Despite service through publication, she did not appear and ultimately she was proceeded against ex-parte on 2.03.2001. Thereafter, the ex-parte proceedings were initiated against the present appellant and ex-parte decree of divorce was granted by the Additional District Judge, Gurdaspur vide order dated 15.06.2001 in favour of the respondent.

The appellant on learning about the grant of ex-parte decree of divorce in favour of the respondent, she moved an application under Order

9 Rule 13 of the Code of Civil Procedure, on 18.08.2001 for setting aside the ex-parte decree dated 15.06.2001 passed by the learned Additional District Judge, Gurdaspur. In her application, the petitioner claimed that after she came to know about the passing of ex-parte judgment and decree of divorce, on 28.07.2001 from a common relation, thereafter she applied for certified copy of the judgment and decree which was supplied to her on 30.07.2001. After the receipt of certified copy of the ex-parte judgment and decree, she filed the application for setting aside the ex-parte decree of divorce.

The aforesaid application was resisted by the respondent-husband on the ground that she had intentionally not appeared in the Court despite of having the knowledge about the pendency of the present petition as her younger sister is married to the younger brother of the respondent, with prior to the marriage of the petitioner with the respondent.

From the pleadings of the parties, the trial court framed the following issues:-

> 1) Whether there are sufficient grounds for setting aside the ex-parte decree passed against the applicant-respondent on 15.06.2001? OPA.
>
> 2) Relief.

After evaluating the evidence brought on the record, the learned Additional District Judge, Gurdaspur dismissed the application of the petitioner for setting aside the ex-parte judgment and decree, vide order dated December 22, 2005. It is this order, which has been challenged before this Court by way of filing the present first appeal against the order.

It is a case where the appellant was proceeded against ex-parte on the strength of publication in the News paper by way of substituted service. Under the Limitation Act, Part I- attached with the Schedule, the period of limitation for moving applications in the specified cases, under article 123, the period of limitation given is thirty days for setting aside a

decree passed ex-parte or to re-hear an appeal decreed or heard ex-parte. It is specifically mentioned that the date of decree or where the summons or notice was not duly served, when the applicant had knowledge of the decree, within the period of thirty days, the application can be moved, as per Article 123 of the Limitation Act, which is reproduced as under:-

> ***"123-To set aside a decree passed ex-parte or to re-hear an appeal decreed or heard ex-parte- Thirty days.***
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> ***Explanation:- For the purpose of this article, substituted service under Rule 20 of Order V of the Code of Civil Procedure, 1908 (5 of 1908) shall not be deemed to be due service".***

Admittedly the application for setting aside the ex-parte judgment and decree was filed within thirty days of obtaining the knowledge of the passing of the decree.

Thus, from the perusal of the order dated December 22, 2005, it is clear that both the parties did not bring this article to the notice of the Additional District Judge, Gurdaspur, who was dealing with the application for setting aside the ex-parte judgment and decree. The explanation given under Article 123 clearly depicts that the substituted service under Order 5 Rule 20 of the Code shall not be deemed to be the due service. If this interpretation to the explanation of Article 123 is taken into consideration, it would mean that the present appellant was not duly served. Therefore, the ex-parte judgment and decree passed on the basis thereof is in violation of the explanation given under Article 123 ibid and the same is liable to be set aside.

As a sequel to my above discussion, the ex-parte judgment and decree passed by the learned Additional District Judge, Gurdaspur, vide order dated 15.06.2001 is not sustainable in the eyes of law.

Accordingly, the appeal is accepted and the ex-parte judgment and decree passed by the Additional District Judge, Gurdaspur is set aside.

As a result the case is remitted back to the court of Additional District Judge, Gurdaspur who shall proceed with the case in accordance with law and shall dispose of the same on merit, after affording due opportunities to the parties concerned.

The parties through their counsel are directed to appear before the learned Additional District Judge, Gurdaspur on September 24, 2007, who shall restore the original petition under Section 13 of the Hindu Marriage Act to its original number and would try to dispose of the same expeditiously.

August 30, 2007. **(R.S.Madan)**
Malik **Judge**